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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 438

WOMETCO TELEVISION AND THEATRE COMPANY,

Appellant,

—v.—

UNITED STATES OF AMERICA and
MIAMI BEACH THEATRE CORP.,

Appellees.

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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Statement

There is now before the Court the appellant's appeal from two orders entered in the United States District Court for the Southern District of New York which respectively (1) denied appellant's motion for leave to intervene in the hearing, argument and determination of a petition filed by Miami Beach Theatre Corp. (a wholly owned subsidiary of Loew's Theatre & Realty Corporation) for leave to acquire a new theatre to be erected in Dade County, Florida, and (2) granted the aforesaid petition, which petition was made in *U. S.* v. *Loew's Incorporated* and pursuant to a judgment entered therein on February 7, 1952. The statement of the

case which is found on pages 7 to 15 of the Jurisdictional Statement is neither amended nor questioned by either of the appellees' briefs filed in support of their respective motions to dismiss or affirm these appeals, and hence it can be assumed the said statement fairly states the case. For this reason it will be incorporated herein by reference and not repeated.

This brief, submitted pursuant to the provisions of Rule 16, Subsection 3, of the Supreme Court Rules will advert only to points raised in the appellees' briefs, and other matters contained in the Jurisdictional Statement will not be restated or repeated in this brief.

ARGUMENT

POINT I

The Supreme Court has jurisdiction to entertain the appeal from the order denying intervention and the said appeal presents a question sufficiently important and substantial to require further argument.

The parties are in accord that the Supreme Court may entertain an appeal denying intervention when (a) intervention as of right under the Federal Rules is denied, or (b) there was an abuse of discretion in denying permissive intervention when the same is allowed under the Federal Rules. The basic contention of the appellant on this point is that the Trial Court abused its discretion in failing to permit the appellant to intervene when the uncontroverted affidavit submitted in support of the motion for leave to intervene showed (1) that the appellant had a substantial financial interest at stake in the subject matter of the petition filed by Miami Beach Theatre Corp., (2) that an action which appellant proposed to institute and

the subject matter of the aforesaid petition of the appellee Miami Beach Theatre Corp. had questions of law and fact in common, (3) that the Government had made no investigation of the facts pertinent and material to the petition filed by Miami Beach Theatre Corp. other than to accept those facts submitted to it by the appellee Miami Beach Theatre Corp., (4) that the Government was both unprepared and unwilling to protect the interests of the public and of the appellant at the hearing of the petition (and in fact did not do so), and (5) that unless the motion for leave to intervene was granted, the hearing on the petition of Miami Beach Theatre Corp. would to all intents and purposes be a non-adversary proceeding.

Appellees have cited cases* in which this Court has either refused jurisdiction on appeals from or has affirmed orders of a District Court where intervention by a private party had been denied in an antitrust suit brought by the Government. However, in each and every one of these cases; the Government had actively participated in the case or the hearing and the proceeding had been adversary throughout. It is believed—and the appellees' briefs cite no case to the contrary—that the Supreme Court has never had presented to it an appeal from a denial of intervention in a phase of an antitrust suit, to which the Government is a party, where, as here, (a) the affidavit in support of the motion to intervene alleges that, and cites evidence to the fact that, the Government on previous applications of similar nature did not investigate the facts surrounding the petition other than to accept those presented to it by counsel for the petitioner (which is a former affiliated

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* *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137; *Ball, Trustee* v. *United States*, 338 U. S. 802; *Partmar Corp.* v. *United States*, 338 U. S. 804; *St. Louis Amusement Co.* v. *United States*, 326 U. S. 680; *Sutphen Estates, Inc.* v. *United States*, 342 U. S. 19; *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131.

theatre circuit found guilty of violating the antitrust laws) and that the government has not made any independent investigation which would enable it to form a judgment as to whether or not the proposed new theatre would unduly restrain competition and to oppose the petition if it decided the said question in the affirmative; (b) that on the instant petition the Government had made no such investigation and was not prepared to oppose the petition and, in fact, was going to recommend to the District Judge that it be granted only on the basis of facts submitted to it by counsel for Miami Beach Theatre Corp.; (c) that no affidavit denying these allegations contained in the affidavit in support of the motion to intervene was submitted and, in fact, at the hearing the Government recommended and strenuously advocated the granting of the petition, but cited no facts to justify its stand other than facts admittedly conveyed to it by the petitioner Miami Beach Theatre Corp.;* (d) that except for arguments permitted to be made by independent exhibitors' counsel as *amici curiae*, the hearing on the petition was, in fact, a non-adversary proceeding throughout; (e) the motion for intervention was made by a party whose existing interests would certainly be affected if the petition on which intervention was sought were granted; and (f) intervention was sought solely on the one phase of the case affecting the appellant's interests and would not affect the basic judgment.

The following facts have been established and should be considered in weighing the applicability of cases cited by the appellees in support of their motions:

1. Although at all stages of these proceedings—in the affidavit in support of the motion to intervene, in the

* See Record on Appeal, Transcript of Stenographer's Minutes of hearings on June 27-28, 1957, pp. 8-12.

argument made by appellant's counsel before the District Court, and in the Jurisdictional Statement filed herein—the appellant alleged that the Government had accepted the statements made to it by counsel for Miami Beach Realty Corp. and had made no independent investigation of the facts, and hence was in no position either to determine whether to support the granting of the petition or to oppose the same, the Government has never, either by affidavit, argument of counsel in the District Court, statement in the brief filed herein with the motion to dismiss, or otherwise, stated or alleged that, except for receiving statements from the petitioner's attorneys, it made any investigation or learned any facts which would enable it to determine whether or not the acquisition by the petitioner of a new theatre in Dade County, Florida, would unduly restrain competition.

2. The proceedings below were non-adversary.

3. Intervention was sought by appellant only as to the limited question whether or not the acquisition of the new theatre by the petitioner would unduly restrain competition and as to no other phase of *U. S.* v. *Loew's Incorporated.*

4. Since the two theatres closest to the proposed new theatre of Miami Beach Theatre Corp. were operated by appellant, appellant had vital interests at stake in these proceedings and was in a position to adduce evidence not otherwise presented which would assist the District Court in determining whether or not the acquisition of this new theatre would unduly restrain competition.

Cases Cited in Appellees' Briefs Are Not Controlling on This Case

The principal case relied on by the Government in its brief supporting its motion to dismiss the appeal or affirm is *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, cited and discussed at pages 5 to 7 of the Government's brief. The reasons advanced by the Supreme Court for affirming the order denying intervention in *Allen* constitute the strongest argument appellant could advance in support of its position here.

1. At page 139 the Supreme Court wrote:

> "The issues, which were tried upon evidence submitted by National and by the Government . . . The proceeding was adversary throughout."

This situation is in sharp contrast to the instant case where there was no evidence submitted other than a very sketchy affidavit by the petitioner and the proceeding was non-adversary throughout.

2. At page 142 the Court wrote:

> "The record here discloses that the parties produced all data they and the court thought was available upon the issues in the case. Moreover, the court invited the Government to call the appellant's president to testify as to his knowledge concerning the issues."

This is in sharp contrast to the instant proceedings where no data was submitted outside of the location and ownership of certain theatres, as set forth in the affidavit submitted in support of the petition, and the appellant was not permitted to introduce any evidence nor were any of appellant's witnesses called to testify by other parties.

3. Also at page 142 the Court wrote:

> "Where, as here, examination of the entire record leading to the court's final order discloses that the issues were thoroughly explored and that the parties were adequately represented, the action of the court denying intervention should not be reviewed."

Contrast this situation with the instant proceedings where an examination of the entire record discloses that there was no evidence taken before the District Court and that the Government adequately and effectively represented the petitioner Miami Beach Theatre Corp., but represented no one else.

Despite the Government's active participation as an adversary to the petitioner in *Allen*, three Justices of the Supreme Court dissented and voted to reverse the order denying intervention.

Both of the appellees' briefs cite *Sutphen Estates, Inc.* v. *United States*, 342 U. S. 19. *Sutphen* vividly illustrates another distinction between the instant case and previous cases decided by this Court and cited in appellees' briefs. One of the chief items, if not the chief item, of relief granted the Government in *U. S.* v. *Paramount* (85 F. Supp. 881, aff'd sub nom. *Loew's Incorporated* v. *U. S.*, 339 U. S. 974) was the divorcement of theatre exhibition from motion picture distribution. In *Sutphen* the would-be intervenor sought intervention in the main case on the major issue of the divorcement of Warner Bros. theatres from the parent company to protect a guarantee of the present Warner Bros. Pictures, Inc. on a lease of theatre property owned by appellant and under lease "to a subsidiary of a subsidiary of Warner" (342 U. S. 19, 21). The Supreme Court (Mr. Justice Black dissenting) dismissed the appeal from the order denying intervention on the grounds (1) that the

claim of injury is "too speculative and too contingent on unknown factors"; and (2) "to prevent the administration of the decree from being burdened with a collateral issue that on this record can properly be adjudicated elsewhere" (342 U. S. 19, 23). In the instant case there was nothing speculative or contingent in the appellant's claim. The judgment in *U. S.* v. *Loew's Incorporated* specifically ordered the District Court to inquire and find as a fact that the acquisition of a new theatre by a former affiliated circuit would not "unduly restrain competition" before granting a petition for leave to take such new theatre. Certainly the operator of the two theatres closest to the site of the proposed new theatre could not be said to have a speculative claim on the issue as to whether or not competition would be unduly restrained. If any competition would be unduly restrained by the proposed new Loew Theatre, it would be that of the appellant's Boulevard Drive-In Theatre and Surf Theatre. Nor is appellant raising a collateral issue. The sole issue on the hearing below was as to whether or not competition would be unduly restrained by a subsidiary of Loew's taking this new theatre. This was the issue and the only issue upon which appellant sought to intervene.

The brief of the appellee Miami Beach Theatre Corp. at page 6 cites in support of its contention *U. S.* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 177. This was the opinion of the Supreme Court remanding to the Statutory Court its original decree. In this opinion the Supreme Court did not disturb the ruling of the Statutory Court denying intervention to certain independent exhibitors and associations of exhibitors. The Supreme Court did "not consider the merits" of the argument advanced by the would-be intervenors because intervention had been sought on the issue of mandatory competitive bidding and mandatory competitive bidding was eliminated from the decree by the action of the Supreme Court. It is also interesting to note

that the position of the Government paralleled that of the would-be intervenors in *Paramount* and the Government prosecuted an appeal from that portion of the decree which made competitive bidding mandatory.

Three other cases cited on page 6 of the appellee Miami Beach Theatre Corp.'s brief, viz., *St. Louis Amusement Co.* v. *United States*, 326 U. S. 680; *Ball, Trustee* v. *United States*, 338 U. S. 802; *Partmar Corp.* v. *United States*, 338 U. S. 804, are not at all applicable to the case at bar. In all these cases, the intervention was sought to influence the basic decree in the case on issues which the Government was actively litigating. In none of these cases was the petition of a former defendant to acquire a new theatre the issue and the Government's brief (p. 9) is, therefore, incorrect in stating that this Court denied "intervention under circumstances precisely like those here." These *per curiam* decisions are in no way precedents governing or even applicable to the instant appeal. In the case *sub judice* intervention was sought on a single issue which vitally affected appellant. Here appellant is not seeking to affect or modify the basic judgments in the case and the Government had not assumed an adversary position paralleling appellant's.

Granting Intervention Would Not Have Delayed Proceedings

The Government's brief (page 8) argues that intervention should have been denied because there might result "delay and prejudice" to the rights of the parties to the main action. This charge is not borne out by the record. On page 6 of the affidavit of Mitchell Wolfson submitted in support of the motion of the appellant to intervene, it is unequivocally stated that "Wometco is ready, willing and able to go forward with the hearing on the return date set forth in the petition of Miami Beach Realty Corp. and

there will be no delay in these proceedings if this motion to intervene is granted." On June 27, 1957, the return date of Miami Beach Theatre Corp.'s petition, the appellant had a witness and other evidence in court and was prepared to go on with the hearing if permitted to do so.

The Motion for Intervention Complied With the Rules

The Miami Beach Theatre Corp.'s brief, at page 9, argues that the appellant should be denied the right to intervene because "it was the public, not a private, interest that the decree sought to protect." This statement is not borne out by either the pleadings or the opinions in this case. From the very inception of *U. S.* v. *Paramount*, the Government sought and the courts granted relief designed to aid both the public and independent exhibitors who had been victimized by the defendants, including Loew's Incorporated. The case was initiated by a petition filed by the Government in 1938. Paragraph 149 of this petition alleged abuses as a result of which an "independent exhibitor is deprived of access to a free, open and untrammeled market." Paragraph 214 of the petition, one of the key paragraphs thereof, is headed: "Trade Practices Imposed Upon Independent Exhibitors." The Supreme Court's opinion in *U. S.* v. *Paramount*, 334 U. S. 131, 172-175, shows that one of the chief concerns of the Court in remanding the case for further hearings on the effect of the vertical integration of some of the defendants was the exclusion of independent exhibitors from the opportunities offered by first-run exhibition.

The argument is advanced in Miami Beach Theatre Corp.'s brief that the denial of intervention was justified because the motion for intervention was not "accompanied by a pleading setting forth the claim or defense for which intervention is sought." Page 5 of the affidavit of Mitchell

Wolfson submitted in support of the motion to intervene specifically adverts to the right of the appellant "to enjoin petitioner (Miami Beach Realty Corp.) from acquiring this theatre if it appeared that such acquisition would unreasonably restrain competition." This statement gives complete and adequate notice not of a vague contemplated suit, but of the specific claim for the protection of which intervention was sought. Requiring a formal pleading to be filed in addition to this statement would be an exaltation of form over substance which is completely foreign to the spirit of the Federal Rules and the adjudications thereunder.

This Appeal Presents an Important Question

The importance of the appeal from the order denying intervention herein transcends the instant case. The first decree entered in *Paramount* was remanded by the Supreme Court (334 U. S. 131) for the further consideration by the Statutory Court of the necessity of divorcing theatre exhibition from motion picture distribution, in order to restore competition to the motion picture industry. Upon consideration on the remand, the Statutory Court ordered divorcement and made a particular point of requiring that the decree enjoin "any theatre-holding corporation resulting from the divorcement * * * from acquiring a beneficial interest in any additional theatre unless the acquiring exhibitor-defendant or corporation shall show to the satisfaction of the court, and the court shall first find, that such acquisition will not unduly restrain competition in the exhibition of feature motion pictures." (*United States* v. *Paramount Pictures, et al.*, 85 F. Supp. 881, 899.) The decree entered after this opinion was affirmed by the Supreme Court, sub nom. *Loew's Incorporated* v. *United States*, 339 U. S. 974. It is clear that the Supreme Court

and the Statutory Court did not intend that the hearing on whether or not a proposed acquisition of a new theatre by a former affiliate would unduly restrain competition should be a *pro forma* non-adversary proceeding. Although we are not suggesting that the spirit and letter of the decree in *Paramount* require the Government to oppose an application for leave to acquire a new theatre when there is no good ground for opposition, it is strongly urged that the preservation of the integrity of the decrees in *Paramount* require either that the Government oppose said application or, if it does not oppose or recommends the granting thereof, that it state to the Court the extent of the investigation made by the Government and the results thereof. If this Court does not consider the appeal from the order denying intervention it will, in effect, be sanctioning what has become the prevalent practice in considering petitions for leave to acquire new theatres by former affiliated theatre circuits and one of the prime safeguards which have been put around a revival of the pernicious practices which the decree in *Paramount* sought to terminate will have been seriously undermined. To insure the enforcement of decrees resulting from its own previous opinions herein, it is necessary for the Supreme Court to consider this appeal.

POINT II

The appeal from the order granting Miami Beach Theatre Corp.'s petition for leave to acquire a new theatre should be considered by the Supreme Court.

The proceeding in which there was entered the second order herein appealed from was held pursuant to Paragraph III 7 (b) of the judgment entered against Loew's Incorporated on February 7, 1952, which judgment is included in the Record on Appeal. In this proceeding the District Judge had presented to him one narrow point and that is whether or not the acquisition of the proposed new theatre by Miami Beach Theatre Corp. would or would not "unduly restrain competition." However, in order to grant the petition, the District Judge under the aforesaid consent judgment had to first find as a fact that the proposed acquisition would not unduly restrain competition. Thus, the burden of proof was thrown on petitioner Miami Beach Theatre Corp.

The Record Lacks Substantial Evidence to Support the District Court's Findings of Fact

The only evidence submitted to the court below was the petition of Miami Beach Theatre Corp. setting forth certain physical facts about the Miami Beach area and, in so far as the motion picture industry was concerned, only the location, capacity, distance from the site of the proposed acquisition, and run of certain other theatres and the conclusory allegation that the proposed acquisition would not unduly restrain competition. At the hearing this petition was supplemented by two maps which showed the locations of the various theatres mentioned in the petition and by no other evidence whatsoever.

In this meagre record there was no substantial evidence on which to base the required finding of the District Court that the proposed acquisition would not unduly restrain competition. At the argument before the District Court, counsel for both appellees stressed the fact that Loew's Theatre & Realty Corporation (the 100 per cent corporate parent of Miami Beach Theatre Corp.) had only two other theatres in Florida, one in Jacksonville and one in Coral Gables, and that the absence of any appreciable numerical strength in the area would effectively preclude Loew's Theatre & Realty Corporation from unduly restraining competition in operating the proposed new theatre. Thus, the question on this appeal narrows down to the point of whether or not evidence of only the fact of the small numerical strength of Loew's Theatre & Realty Corporation's holdings in the area, without evidence as to how these few theatres had been operated or how the proposed new theatre would or could be operated by Loew's, was substantial enough evidence on which to base the finding that competition would not be unduly restrained.

One theatre, if given an opportunity to acquire a first run of pictures in any given area by means not available to its competitors, can illegally, effectively and unduly restrain competition in exhibition in that area. This was recognized by the Supreme Court. "The main contest is over the cream of the exhibition business—that of the first-run theatres." (*U. S. v. Paramount Pictures*, 334 U. S. 131, 166.)

The Supreme Court also said at page 167:

> "The central problem presented by these cases is which exhibitors get the highly profitable first-run business. That problem has important aspect under the Sherman Act."

Petitioner Intends to Operate the Proposed New Theatre on a First Run

Although no evidence was presented to the Court as to the run on which Loew's Theatre & Realty Corporation would attempt to operate the proposed new theatre, counsel for the Government stated to the District Judge that it had been advised by the petitioner that it would attempt to operate the same on a first-run.

Counsel for the appellant, arguing by the court's permission as *amicus curiae*, stated certain facts to the court which made all the more pressing an inquiry into how and why the new Loew suburban theatre proposed to obtain a first run previously denied all other suburban theatres in Miami Beach by the distributors—Loew's erstwhile co-defending conspirators. Prior to 1956 the first runs in the Greater Miami area had been exhibited simultaneously (or day and date as it is known in the trade) in three separate centers: (1) the Flagler Street shopping area in Miami, (2) the Lincoln Road shopping area in Miami Beach, and (3) the Miracle Mile shopping area in Coral Gables. Each of these three areas constituted the most important downtown shopping center in its district. In each of these three areas, first-run pictures were licensed on a competitive bidding basis and there was intense competition for first-run pictures in each of these areas. Prior to 1956 not a single one of the many conventional indoor theatres and drive-in theatres located in Miami—Miami Beach—Coral Gables, except those in the downtown shopping areas (*supra*), was permitted by the distributors to exhibit a first-run picture or even to bid for the privilege. The distributors all took the position that the proper distribution of their pictures required a first run in the downtown shopping areas only and subsequent-run exhibitions in other outlying theatres thereafter. However, in 1956 a subsidiary of Loew's Theatre & Realty Corporation, by permission of the District

Court granted pursuant to Section III 7 (b) of the judgment against Loew's Incorporated, opened its Riviera Theatre on the border of South Miami and Coral Gables and was given the right by several distributors, led by Loew's Incorporated, to bid for first-run pictures. No explanation was given to the court either in the form of affidavit or argument as to why Loew's Riviera Theatre was given an opportunity to bid for first-run pictures when such privilege had been theretofore denied to every other theatre in the entire vicinity not located in one of the three downtown centers.

With the experience of Loew's Riviera Theatre in mind, it is easy to see that the lack of numerical strength of Loew's in the area does not inhibit its potential for unduly restraining competition. All the theatres located in the general vicinity of the site of the proposed new theatre have been served pictures by all distributors including Loew's Incorporated on a subsequent-run basis, that is, a run following the downtown Lincoln Road first run. If the new Loew theatre in the midst of all these theatres is granted the privilege of bidding or otherwise negotiating for first-run pictures, which privilege had been theretofore denied to other theatres in the vicinity and might in the future be denied them if precedent were any prediction of the future course of the distributors, then indeed the petitioner with its one theatre would not only be unduly restraining competition but would be threatening the very existence of these other theatres. An inquiry as to the run to be granted the proposed new theatre and as to the run to be granted its competitors, including appellant's Boulevard Drive-In Theatre and Surf Theatre, was necessary before there would be substantial evidence before the District Court on which the affirmative finding that the proposed new theatre would not unduly restrain competition could be made.

Suggested Terms for Granting Petitioner Leave to Acquire the Proposed Theatre

Appellant's counsel suggested to the District Court that the rights of all parties could be preserved by granting the petitioner leave to acquire the new theatre but on condition that the new theatre not exhibit pictures on any run earlier than that which until now has been afforded its competitors unless an earlier run were first approved by the District Court. This proposal would have enabled the petitioner to take its new theatre and compete on equal terms with the other theatres in the vicinity. It would not even have inhibited the new Loew Theatre from getting a better run provided it could first show to the District Judge that the said better run was granted as a result of legitimate business considerations and not because the operator of the new theatre was a wholly owned subsidiary of Loew's Theatre & Realty Corporation. Such an order would have prevented a repetition of what has occurred in Coral Gables where Loew has only one theatre.

Loew's Incorporated Would Be the Ultimate Beneficial Owner of the Proposed New Theatre for an Indefinite Period

After the *Paramount* case was remanded to the Statutory Court, the decree was redrafted to provide that the basic remedy for the abuses found to have existed in the motion picture industry was a complete divorcement and divestiture of distribution from exhibition. In so far as the Loew defendants were concerned, the mechanics of implementing this general decree (which was filed February 10, 1950) were contained in the consent (so-called) judgment entered against Loew's Incorporated on February 7, 1952. *Inter alia*, this judgment provided for (a) the formation of a new theatre company which would operate independently of Loew's Incorporated (which retained its production and

distribution business); and (b) a complete divestiture by Loew's Incorporated of its stock in the new theatre company within a three-year period from the entry of the decree, which period could be extended to five years.

Paragraph III 7 (b) of this judgment permitted applications by the new theatre company for leave to acquire new theatres to be made after the divorcement of the theatres had been accomplished even though divestiture of the stock had not yet been completed. It is important to note, however, that the judgment embodied a provision that the divestiture of stock had to be accomplished within five years from the date of judgment in any event. Therefore, it is reasonable to assume that the Statutory Court permitted applications for leave to take new theatres to be made by the new theatre company before divestiture of the theatre company's stock by Loew's Incorporated, since Loew's Incorporated would in any event have only a temporary interest in any such new theatre, which interest had to be cut off by a definite date—February 6, 1957.

On February 4, 1957 the District Judge entered an order which postponed the dates in the Consent Judgment against Loew's Incorporated for the "division or refinancing of stock distribution" of the new theatre company's interest from Lowe's Incorporated "until further order of this court."* The effect of this order is to enable Loew's Incorporated to keep its interest in exhibition through its ownership of the stock of Loew's Theatre & Realty Corporation until further order of the court at an indefinite future date.

At no time in these proceedings has the appellant sought to question the propriety of the entry of the order of February 4, 1957 and it most certainly is not seeking to reopen that subject here. However, appellant did urge the District

* This order is included in the Record on Appeal.

Judge to consider whether or not the indefinite postponement of the date of divestiture by Loew's Incorporated was not a matter to be given great weight in passing upon the instant petition of Miami Beach Theatre Corp. The order of February 4, 1957 permitted the *status quo* to remain undisturbed for reasons which were sufficient to the District Judge. However, it is quite a different thing to say that not only is the existing stake in theatre exhibition of Loew's Incorporated not to be disturbed until certain problems can be worked out, but in addition that Loew's Incorporated will be permitted to increase its interest in exhibition through additional acquisitions by Loew's Theatre & Realty Corporation. The latter case is entirely foreign to the spirit and letter of the previous opinions and judgments in *Paramount* which ordered a complete divorcement of exhibition interests from distribution interests.

In raising this point appellant was not merely arguing a theoretical point. During the argument below the District Judge was advised that during the period from February 16, 1956, when Loew's Riviera Theatre in Coral Gables opened, until April 18, 1957, the said Riviera Theatre played 33⅓ per cent of the pictures distributed by Loew's Incorporated on a first run, whereas the percentage of pictures of other companies played by the Riviera Theatre on a first run ranged from 4-76/100 per cent to 17-1/10 per cent. Certainly the District Judge should have received evidence as to whether or not this wide discrepancy in the case of pictures distributed by Loew's Incorporated playing at the Riviera Theatre as opposed to pictures distributed by other distributors was in some way related to the ownership by Loew's Incorporated of the exhibition company's stock. If an important distributor, such as Loew's Incorporated, were to unduly favor the proposed new Loew's theatre, this would be another means of unduly retraining competition in favor of a single theatre located in the midst

of many other theatres. That this method had been used successfully before to strangle competition is shown in the *Paramount* decrees and opinions and in the recent experience at Loew's Riviera Theatre in Coral Gables, yet the District Judge received no evidence, substantial or otherwise, on this point.

CONCLUSION

For the reasons stated in the Jurisdictional Statement and stated herein, the Supreme Court has jurisdiction over both of these appeals which present substantial meritorious and important questions requiring plenary arguments and further consideration by the Supreme Court.

Respectfully submitted,

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